RESULTING TRUSTS AND THE STATUTE OF FRAUDS.

If A conveys land to B upon a parol agreement that B is to hold the land thus conveyed in trust for A, and B, thereafter relying upon the Statute of Frauds, repudiates the trust, has A any remedy?

A number of jurisdictions have answered this question in the negative,[1] thus permitting the grantee not only to repudiate the obligation voluntarily assumed by him, but further enabling him to deprive the grantor of his property. It is believed that these decisions are based upon false premises, and that a proper consideration of the questions of law involved should result in the conclusion reached by the English Courts,[2] and by a few American Courts,[3] that the grantor is entitled to a remedy.

The Statute of Frauds expressly exempts from its operation trusts which "arise or result by the implication or operation of law."[4] The proper application of the Statute, therefore, necessarily presupposes an accurate classification of trusts. Text writers and courts not infrequently fail to make such classification, with the result that the Statute in many of the decisions referred to is given a scope and effect

[1] Leman *v.* Whitley (1828) 4 Russ. 423; Patton *v.* Beecher (1878) 62 Ala. 579; Brock *v.* Brock (1889) 90 Ala. 86; Burt *v.* Wilson (1865) 28 Cal. 632; Lawson *v.* Lawson (1886) 117 Ill. 98; Moore *v.* Horsley (1895) 156 Ill. 36; Titcomb *v.* Morrill (Mass. 1865) 10 Allen 15; Bartlett *v.* Bartlett (Mass. 1859) 14 Gray 277; Fitzgerald *v.* Fitzgerald (1897) 168 Mass. 488; Pillsbury-Washburn Flour Mills Co. *v.* Kistler (1893) 53 Minn. 123; Sturtevant *v.* Sturtevant (1859) 20 N. Y. 39; Daily *v.* Kinsler (1891) 31 Neb. 340.

[2] Hutchins *v.* Lee (1737) 1 Atk. 447; Young *v.* Peachy (1741) 2 Atk. 254; Davies *v.* Otty (1865) 35 Beav. 208; Lincoln *v.* Wright (1859) 4 DeG. and J. 16, 22 (*semble*); Booth *v.* Turle (1873) L. R. 16 Eq. 182; Haigh *v.* Kaye (1872) L. R. 7 Ch. App. Cases 469; Davis *v.* Whitehead [1894] 2 Ch. 133; Rochefoucauld *v.* Boustead [1897] 1 Ch. 196.

[3] Barrell *v.* Hanrick (1868) 42 Ala. 60; Tinkler *v.* Swaynie (1880) 71 Ind. 562; Cox *v.* Arnsmann (1881) 76 Ind. 210; Catalini *v.* Catalini (1889) 124 Ind. 54; Myers *v.* Jackson (1893) 135 Ind. 136; Stall *v.* Cincinnati (1865) 16 Ohio St. 169 (*semble*); Ryan *v.* O'Connor (1884) 41 Ohio St. 368 (*semble*); Peacock *v.* Nelson (1872) 50 Mo. 256; Taylor *v.* Thompson (1885) 88 Mo. 86 (*semble*).

[4] Statute 29 Charles II., Ch. 3, Secs. 7, 8 and 9. For reference to American Statutes which have substantially the same phraseology, see Ames's Cases on Trusts, pp. 176–8.

not justified by its language, and wholly inconsistent with the purposes of courts of equity, and the principles upon which they act.

A true trust, like a true contract, is an obligation flowing from the intention of the person to be charged with it, and because of the similarity in the source of the two obligations, it would seem that the classification applicable to contracts might also be applied to trusts. Contracts have been classified as (1) true or real contracts, and (2) quasi contracts or contracts implied in law.

(1) True or real contracts are contracts which are the creation of the actual intention of the parties to them and may be either (a) express, *i. e.*, the intention is expressed in written or spoken language, or (b) implied, *i. e.*, the intention is inferred from the acts or conduct of the parties to the contract.

(2) Quasi contracts or contracts implied in law are contracts, the obligation of which does not arise from the intention of the parties, but is imposed upon them by the operation of express statute or some rule of law based upon some principle of justice to which the law has given its sanction.[1] In like manner, with reference to the origin of the obligation, trusts may be classified as (1) true or express trusts, and (2) constructive or quasi trusts.

(1) The express trust being the result of intention, must always be created either by (a) the written or spoken expression of that intention by the party who is "enabled to declare such trust,"[2] or by his acts and conduct from which such intention may be inferred.[3]

(2) The constructive trust, like the quasi contract, is an obligation imposed by law, quite irrespective of intention. The fraudulent vendee and the innocent donee of trust property are typical examples of constructive trustees whose obligations arise without their intention and oftentimes in spite of it.

The suggested classification of trusts into real trusts and constructive trusts being based wholly upon the presence or absence of intention of the party sought to be held as trus-

[1] Keener, Quasi Contracts, p. 1 *et seq.*

[2] Statute of Frauds, 29 Charles II, Ch. 3, Sec. 7.

[3] See Ex parte Pye (1811) 18 Vesey 140.

tee, should comprehend all possible forms of trust, yet by it apparently no provision is made for so-called "resulting trusts," a term which is suggested by the Statute of Frauds, and to which frequent reference is made in the text books and cases. Resulting trusts are sometimes referred to by judges and the writers of text books as though they were synonymous with certain forms of constructive trusts,[1] and sometimes, as constituting a separate and distinct class of trusts, which are neither real trusts, as above defined, nor constructive trusts, although the reader seeks in vain for the statement of any sound distinction between the "resulting trust" and constructive trusts or trusts implied in law.[2]

It is believed that to this confusion of thought and expression in the books consequent upon the want of accurate classification, is due the failure of justice in the many cases, to which reference has been made.

A so-called resulting use, the forerunner of a resulting trust, arose whenever a common law conveyance (by feoffment, fine or recovery) was made by A to B without consideration, in which case a use was held to result in favor of A.[3]

In the same way trusts were held to result after the Statute of Uses.[4]

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[1] 4 Kent, Com. 305; Perry, Trusts (5th Ed.) § 124, *et seq.;* Lewin, Trusts (9th Ed.) p. 150, and see note, Lewin (13th Ed.) 120.

[2] Perry, Trusts (5th Ed.) §§125-126; Lomax Dig. 200; Hill on Trustees (2d Ed.) 91; Andrews J., in Wood *v.* Rabe (1884) 96 N. Y. 414, 422-3; Lewin, Trusts (13th Ed.) 120. "I am now bound down by the Statute of Frauds and Perjuries to construe nothing a resulting trust but what are called trusts by operation of law and what are those? First, when an estate is purchased in the name of one person, but the money or consideration is given by another, or, secondly, where a trust is declared only as to part and nothing said as to the rest, in which case what remains undisposed of will result to the heir-at-law. I do not know any other instance besides the two, when the Court has declared resulting trusts by operation of law, unless in case of fraud where transactions have been carried on *Mala Fide.*" Lord Hardwicke in Lloyd *v.* Spillet (1740) 2 Atk. 148, 150.

[3] Digby's History of Real Property (5th Ed.) 329, 355; Sugden's Gilbert on Uses (3d Ed.) Ch. 1, §589, pp. 117, 422; id. pp. 93-4, 125; Cruise Dig., Tit. 11, Chap. IV, § 16; Bacon on Uses, 217; Coke Inst. 271a.

[4] Audley's Case (1558) Dyer 166a; Woodliff *v.* Drury (1595) Cro. Eliz. 439; Duke of Norfolk *v.* Brown (1697) Prec. in Ch. 80; Warman *v.* Seaman (1675) Freeman Ch. 306; Hayes *v.* Kingdome (1681) 1 Vernon 33; Grey *v.* Grey (1677) 2 Swans. 594, 598; Sculthorp *v.* Burgess (1790) 1 Vesey, Jr., 92; Tyrrell's Case (1674) 1 Freeman 304; Ward *v.* Lant (1701) Prec. in Ch. 182; Elliott *v.* Elliott (1677) 2 Ch. Cas. 231.

All resulting uses or trusts will be found to be some variation of this principle, viz., that one is presumed not to be a donor of property conveyed or caused to be conveyed by him. Thus, where a feoffment was made to uses, and the entire use was not disposed of, there was a resulting use in favor of the feoffor for so much of the use as remained undisposed of.[1] The doctrine that where A paid the purchase price of property, but had the conveyance taken in the name of B, a trust resulted in A's favor, which early became established in the law,[2] was a variation of the original doctrine of resulting uses, and it will be found that all the so-called resulting trusts are forms of one of the two classes of cases, viz., where A conveys property to B, without receiving consideration therefor, or where A purchases property from the third person and takes the conveyance in the name of B.

The distinctive feature of resulting uses which in every case differentiated them from constructive uses and trusts, is that the resulting use failed in every case if it were established by affirmative evidence that the intention of the parties was, that no use or trust should result.[3]

If A, who had conveyed his land to B by voluntary gift, claimed that B held the property for his use, it was only necessary for him to prove the conveyance, and that no con-

[1] Sir E. Clare's Case (1599) 6 Rep. 17 b; Woodliff *v.* Drury (1595) Cro. Eliz. 439; Penhay *v.* Hurrell (1699) 2 Vernon 370; Wills *v.* Palmer (1723) 2 Wm. Black. R. 687; Lloyd *v.* Spillet (1740) 2 Atk. 148.

[2] Ambrose *v.* Ambrose (1716) 1 Peere Williams 321; Ex Parte Vernon (1729) 2 id. 549; Hungate *v.* Hungate (1606) Tothill 120; Gascoigne *v.* Thwing (1685) 1 Vernon 366 (*semble*); Riddle *v.* Emerson (1682) 1 Vernon 108; Grey *v.* Grey (1677) 2 Swans. 594; Elliott *v.* Elliott (1677) 2 Ch. Cas. 231; Ryall *v.* Ryall (1739) 1 Atk. 59; Lloyd *v.* Spillet (1740) 2 Atk. 148; and see also, cases cited in Perry on Trusts (5th Ed.) §126.

[3] Roe *v.* Popham (1778) 1 Doug. 25 (*semble*); Altham *v.* Lord Anglesley (1709); Gilbert's Rep. 16; Adams *v.* Savage (1703) 2 Lord Raymond 854; Bellasis *v.* Compton (1693) 2 Vernon 294; 1 Cruise Dig., Tit. 11, Ch. 4, §38; Saunders Uses and Trusts, Vol. I., 105; Sugden's Gilbert on Uses and Trusts, I., 347; Digby's History of Real Property (4th Ed.) 346.

The presumption of a resulting use might be rebutted by the words "to the use of " in the conveyance. Stapley *v.* Lark, Goldsb. 82 pl. 23. That the donee was intended to take beneficially, and that, consequently, no use would result, might be inferred from the circumstances of the conveyance. Adams *v.* Savage, supra; Altham *v.* Anglesley, supra; Thrustout *v.* Peake (1762) 1 Str. 12. In the same way, the presumption of a resulting trust in the case where A purchased property but took the conveyance in the name of B, might be rebutted by parol evidence. Dyer *v.* Dyer (1788) 2 Cox Eq. 92; Murless *v.* Franklin (1818) 1 Swan. 13; Mumma *v.* Mumma (1687) 2 Vernon 19 and note.

sideration was given by B therefor, and A thereby established *prima facie* the existence of a use or trust in his favor. B, however, might rebut A's *prima facie* case by introducing evidence that the conveyance was intended to vest in B the beneficial interest as well as the legal title. That such should have been the rule which ultimately became applicable to this class of conveyance is not surprising, when it is remembered that the conveyance of land to uses was before the Statute of Uses, the rule, rather than the exception.[1] It was a common fact giving rise to a true or rebuttable presumption of fact which aided the plaintiff in establishing his claim as a *cestui que use.* The presumption of a resulting use was therefore a mere rule of proof which cast the burden of evidence as distinguished from the burden of proof on the defendant.[2] Since it was always open to the defendant to prove purchase or otherwise disprove intent to create a use resulting to the feoffor, an adjudication that a use resulted to the feoffor was necessarily an adjudication on the proof that the trust was an express trust flowing from intention of the feoffor. It is submitted, therefore, that the resulting use or trust was in its origin an express use or trust, differing from other express uses or trusts only in that it was proved in a particular way, *i. e.*, the person claiming under it was given the aid of a presumption in establishing his claim. To say that such a trust is a trust raised by operation or implication of law is equivalent to saying at the present day that the contract arising when the defendant orders his grocer to deliver goods without expressly promising to pay therefor is a quasi contract, because upon proof of the facts in an action in *indebitatus assumpsit* for goods sold and delivered the trial judge directs a verdict for the plaintiff.

[1] "Scarcely any person can be certainly assured of any lands by them purchased nor know surely against whom they shall use these actions or executions for these rights, titles and duties." Preamble Statute of Uses, 27 Henry VIII., Cap. 10; Sugden's Gilbert on Uses, 45.

[2] "And therefore I do judge that the intendment of a use to the feoffor, where the feoffment was made without consideration, grew long after, when uses waxed general; and for this reason, because when feoffments were made, and it rested doubtful whether it were in use or in purchase, because purchases were things notorious, and uses things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof upon the purchaser." Bacon's Tracts, p. 317.

The importance of distinguishing this, the resulting trust, as something essentially different in the nature and origin from the constructive trust or trust imposed by operation of law becomes more apparent upon consideration of the relation of the Statute of Frauds to the case under consideration, namely, when A conveys property to B upon a parol trust for the grantor. Before the Statute of Uses such a case would have been a typical case of resulting use, which was *prima facie* established by proof of the conveyance to B without consideration. Since the resulting trust is not within the prohibition of the Statute of Frauds, the fact that there was no written declaration of trust would seem to be immaterial, and since B can offer no affirmatire proof of an intention that no trust was to result to A, A should logically be allowed to establish the trust by the same means and with the same facility after as before the enactment of the Statute. Such would undoubtedly have been the law, were it not for the anomalous result reached by the decisions which establish that in the case of a conveyance without consideration the resulting trust has disappeared from our law,[1] although in the

[1] Hutchins *v.* Lee (1737) 1 Atk. 447; Lloyd *v.* Spillet, supra; Young *v.* Peachy (1741) 2 Atk. 254; Fordyce *v.* Willis (1791) 3 Bro. C. C. 577; Cook *v.* Fountain (1676) 3 Swans. 585; Leman *v.* Whitley (1828) 4 Russ. Ch. 423; Groff *v.* Rohrer (1871) 35 Md. 327; Hogan *v.* Jaques (1868) 19 N. J. Eq. 123; Lovett *v.* Taylor (1896) 54 N. J. Eq. 311; Titcomb *v.* Morrill (1865) 10 Allen 15; Bartlett *v.* Bartlett (1859) 14 Gray 277; and see cases in Note 1, p. 326.

It is believed that this change in the law was consequent upon the change in method of conveyancing, following the enactment of the Statute of Uses. After the Statute, as before, if a common law conveyance was made without consideration, a use resulted to the grantor, the result being that by virtue of the Statute, the title remained in the grantor. Armstrong *v.* Wholesey (1755) 2 Wills. 19; Beckwith's Case, Dyer 146b, and see note 3, p. 328, supra.

After the Statute, however, land was commonly conveyed by deed of bargain and sale or by lease and release. It is doubtful if a use ever resulted upon a conveyance by lease and release (Sanders, Uses and Trusts, pp. 480–488), and the deed of bargain and sale was inconsistent with the existence of a use in the grantor, since it was necessary to raise a use in the grantee by the bargain and sale, in order to vest the title in the grantee by execution of the use, pursuant to the Statute. The use of either of these forms of conveyance therefore precluded a resulting use. A considerable period elapsed after the Statute, before the practice arose of creating a use upon a use. Foord *v.* Hoskins, in 12 James I., 2 Bulstrode, p. 337, is the first case giving an intimation of this practice. When the custom became established, in those cases where A purchased property from the third person and took the conveyance in the name of B, the Courts seem to have presumed the use upon a use in A's favor, irrespective of the form of

case where A purchased land from a third person, who, at A's request conveys it to B, a volunteer, it is held that a trust still results to A, which is not within the operation of the Statute of Frauds.[1]

Since, in the case of a direct voluntary conveyance from A to B there is now no resulting trust in favor of A, A will necessarily be precluded from enforcing the trust or claiming the property from B, if B sets up the Statute of Frauds as a defense, unless the situation created by the conveyance by A, and the repudiation of his obligation by B, is such that equity will impose upon B the obligation of a constructive trustee in A's favor. Unfortunately, many courts, failing to recognize the essential difference between resulting trusts and constructive trusts above pointed out, and regarding the resulting trust as but a form of the constructive trust, created by operation of law, have reached the conclusion that the disappearance of the resulting trust from our law precludes A from any recovery. The argument suggested by them is, that the trust in A's favor cannot be enforced as an express trust, because of the Statute of Frauds, nor can it be enforced as a trust raised "by implication of law," because the particular form of trust sought to be enforced is a resulting trust, which is now obsolete. That the plaintiff should, therefore, fail of recovery because the foregoing alternatives exhaust all possible theories upon which he may base a recovery.[2]

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conveyance, thus preserving the resulting trust in that class of cases, except in those jurisdictions where it has been abolished by statute. In the case of a conveyance without consideration from A to B directly by deed courts have never presumed a use upon the use in A's favor. Just why, it seems difficult to say, except possibly that the presumption in the former case is a more natural one than in the latter. Some modern decisions in refusing to give A any relief in the case under consideration have based their decisions in part at least on the ground that the form of deed precluded a resulting use in the grantor. See Russ *v.* Mebius (1860) 16 Cal. 350; Hogan *v.* Jaques (1868) 19 N. J. Eq. 123; Blodgett *v.* Hildreth (1870) 103 Mass. 484, 486; Graves *v.* Graves (1854) 29 N. H. 129; Movan *v.* Hays (N. Y. 1815) 1 Johns. Ch. 339; Rathbun. *v.* Rathbun (1849) 6 Barb. 98; Randall *v.* Phillips (1824) 3 Mason 378; Allison *v.* Kurtz (1834) 2 Watts 185; Wilkinson *v.* Wilkinson (N. C. 1833) 2 Dev. 376.

[1] See a very complete collection of the cases in Perry on Trusts (5th Ed.) Sec. 126.

Resulting trusts have been abolished by statutes in New York. New York Real Property Law, Secs. 71, 73. Also in Michigan and Wisconsin. Connolly *v.* Keating (1894) 102 Mich. 1; Strong *v.* Gordon (1897) 96 Wis. 476.

[2] Patton *v.* Beecher (1878) 62 Ala. 529; Groff *v.* Rohrer (1876) 35 Md. 327; Lovett *v.* Taylor (1896) 54 N. J. Eq. 311.

The fact, however, that the voluntary gift from A to B does not raise a resulting trust should not preclude A from recovery upon the theory that there is a quasi or constructive trust in his favor. Since, as has already been pointed out, the resulting trust is not a form of constructive trust as above defined, the decisions holding that there is no resulting trust in the case under consideration are not inconsistent with the existence of a constructive trust in A's favor, if upon accepted principles of equity some basis for raising such a trust should be found, since constructive trusts, *i. e.*, trusts arising *ex maleficio* are concededly not within the Statute. It is submitted that the principles of equity, fully accepted and applied in analogous cases require that such result should be reached. The cases which deny relief to A in the case supposed, in effect admit that a trust is created by the conveyance of A, accompanied by the parol declaration of B the grantee,[1] although such trust cannot be enforced because of the Statute of Frauds, and the result is, that B, who has received the trust *res* for the purpose of performing the trust imposed upon it, is enabled to repudiate his obligations without restoring the property thus received.

In the precisely analogous cases of money, property or service given by one in performance of his contract, the performance of which on the other side cannot be enforced by him because of the Statute of Frauds, a different result has been reached, and one which it is believed is more consistent with principle.[2]

The Statute in such cases does not prevent the contract from coming into existence and so long as the defendant is ready and willing to perform the contract on his part

[1] That the Statute, as in the case of contracts, does not prevent the trust obligation from coming into existence, although the statute may be pleaded in defense to any action or proceeding brought to enforce the obligation, see cases collected in Ames's Cases on Trusts, p. 181.

[2] Money paid: Pulbrook v. Lawes (1876) 1 Q. B. D. 284; Wiley *v.* Bradley (1877) 60 Ind. 62; Jarboe *v.* Leverin (1882) 85 Ind. 496; Segars *v.* Segars (1880) 71 Me. 530; Cook *v.* Doggett (Mass. 1861) 2 Allen 439; Herrick *v.* Newell (1892) 49 Minn. 198; Dowling *v.* McKenney (1878) 124 Mass. 478; Ellis *v.* Cary (1889) 74 Wis. 176; Wonsettler *v.* Lee (1888) 40 Kan. 367; Montague *v.* Garnet (Ky. 1867) 3 Bush. 297; Cadman *v.* Markle (1889) 76 Mich. 448; Erben *v.* Lorillard (1859) 19 N. Y. 299; Galvin *v.* Prentice (1871) 45 N. Y. 162. Property: Day *v.* R. R. Co. (1873) 51 N. Y. 583 (*semble*); Hanly *v.* Moody, 24 Vol. 603.

the plaintiff who has performed the contract on his side has suffered no injury and the law gives him no remedy.[1] If, however, the defendant relying upon the Statute of Frauds repudiates his contract, the plaintiff may recover the reasonable value of the performance given by him on the theory that the law will impose upon the defendant this equitable obligation to restore to the plaintiff the property which he has received for a specific purpose which he has repudiated. Such a result is not inconsistent with the Statute, which bars a remedy upon the contract, since the right asserted and the remedy sought are distinct from the right and the remedy arising upon the contract. The right asserted is the right to restitution, growing out of the defendant's inequitable conduct in attempting to retain the benefit of his contract without assuming its burdens and is essentially different from the right to have the defendant perform his contract. The remedy sought is the return of the thing given or its money's worth, which is always theoretically different, and, in most cases, practically different from the remedy by damages for breach of contract.

The fact that the recovery allowed in this class of cases is for a sum of money in an action at law is not significant, since the principle upon which the plaintiff is entitled to recover is equitable,[2] and one which was borrowed from courts of equity by the courts of law and enforced by them in the action of *indebitatus assumpsit*, the use of which form of action, was expanded to include substantially all cases where the plaintiff sought to recover a sum of money whether upon strictly legal or upon equitable grounds.[3]

If the performance on the plaintiff's part were the conveyance of land, he should be allowed to recover the value of the land,[4] or at his option upon filing a bill, equity should impose upon his grantee, the obligation of a constructive trustee and compel a reconveyance of his prop-

[1] Keener's Quasi Contracts, 232 *et seq.*

[2] Anonymous, Freeman, 486.

[3] See article, History of Assumpsit, Professor Ames, 2 Har. L. R. 64; Keener's Quasi Contracts, 14–26.

[4] Basford *v.* Pearson (Mass. 1864) 9 Allen 387; Peabody *v.* Fellows (1901) 177 Mass. 290. Under the common law procedure, there was a technical bar to the plaintiff's recovery, owing to the fact that there was no common or indebitatus count for land sold, but this is obviated by the statutory abolition of form of procedure.

erty to the plaintiff. Such is invariably the remedy afforded in equity in cases of defrauded vendors, although the defrauded vendor may, in general, upon like principle, proceed in quasi contract and recover the value of the property in lieu of the specific property itself.[1] It is submitted that no sound distinction can be drawn between the position of a plaintiff, who, on the one hand, is seeking a recovery in quasi contract of the value of land conveyed by him in performance of a contract which is not enforcible because of the Statute of Frauds, or who, upon like grounds, is seeking to recover the specific property, and the position of a plaintiff, who, on the other hand, is seeking to recover property conveyed by him to another upon a trust which that other, relying upon the Statute of Frauds, has repudiated.

In each, rights have been conferred and obligations imposed, although they are not enforcible in the event that the defendant sets up the Statute in defense. In each, the plaintiff has conveyed property to the defendant, relying upon his performance of the obligation, and in each equity and good conscience require the defendant to restore the property to the plaintiff if he is unwilling to perform the obligation.

The fact that in the case of contract the plaintiff has made the conveyance pursuant to an obligation, whereas in the case of a trust the conveyance is voluntary, would seem not to be material. The obligation itself is voluntarily assumed, and the same result in case of contracts would doubtless follow in the case of a unilateral contract in which the plaintiff as promisee had acquired rights, but assumed no obligation.

It has been frequently stated, however, that to allow the plaintiff a remedy in the case of trust is to impose upon the defendant the very obligation which is made non-enforcible by the Statute.[2]

This proposition has seldom been more forcibly stated than by Chief Justice Brickell in Patton *v.* Beecher:

[1] Keener's Quasi Contracts, 159 *et seq.*

[2] Patton *v.* Beecher (1878) 62 Ala. 579; Sturtevant *v.* Sturtevant (1859) 20 N. Y. 39; Pillsbury Mills Co. *v.* Kistler (Minn. 1893) 54 N. W. 1063; Wood *v.* Rabe (1884) 96 N. Y. 414; Lovett *v.* Taylor (1896) 54 N. J. Eq. 311; Rasdall *v.* Rasdall (1859) 9 Wis. 379.

"It is an annihilation of the statutes, to withdraw a case from its operation, because of such violation or repudiation of an agreement or trust, it declares shall not be made or proved by parol. There can be no fraud, if the trust does not exist, and proof of its existence by parol, is that which the statute forbids. In any and every case, in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation."

The statement of the learned judge suggests that the case differs from the analogous case of contract, where the obligation to restore the property given by plaintiff in performance of his contract is manifestly different from the defendant's obligation to perform his contract, in that in the case under consideration the plain remedy sought by the plaintiff is an enforcement of the express trust and not as in the case of quasi contract the remedy of restitution.

It may be affirmed that no such difference exists between the case of contract and the case of trust, and that the statement above referred to is based upon a confusion of rights with remedies. The plaintiff in the case of trust may assert either one of two distinct rights: one as the *cestui que trust* of an express trust created by the plaintiff's conveyance and parol declaration; the other in the event that the defendant repudiates the trust, as *cestui que trust* of a constructive trust of the property which in equity and good conscience should be restored to him, since the defendant has repudiated his express obligation and taken shelter under the Statute.

That the remedy in each of the cases supposed is identical, determines nothing as to the right asserted, nor does the fact that the bar of the Statute prevents the assertion of the right in the first case and the consequent recovery, bar the assertion of the right in the second. It would certainly be a novel proposition to assert that a plaintiff in an action in quasi contract brought to recover the value of his performance given under a contract barred by the Statute of Frauds was enforcing the contract merely because it appeared that the amount of recovery by way of restitution in a given case happened to be the same as the amount of damages for breach of contract, and yet this is in effect what

is asserted by the Court in stating that the giving of any remedy to the plaintiff grantor would amount to an annihilation of the Statute.

Nor in the case of trust is the remedy upon the express trust necessarily identical with the remedy afforded when equity raises a constructive trust in favor of the grantor. If, for example, under the statute law of New York and of some other States, A conveyed land to B upon a parol trust to receive the rents, issues and profits, and pay them over to A for life, an express trust would be created in A's favor, and the duty imposed upon B to *retain* the property conveyed for the purpose of carrying out the trust. If, however, B repudiated the trust and equity made him a constructive trustee for A upon the theory of restitution, the remedy afforded would necessarily be the immediate return of the property to A, a result which could not be reached by enforcing the trust and consequently one which may be reached without reference to the Statute.

Even in the absence of statute, the duty of a trustee of an express trust may be to retain possession of the trust *res* for the purpose of administering it. Such duty would be absolutely inconsistent with the duty of restoring the property to the person creating the trust, which, of course, would not be a duty under the express trust.[1]

It is believed that failure to recognize the essential difference between the right to restitution and the right to compel performance of the express trust is responsible for the decisions that the grantor in the case under consideration must go without remedy.

The Court in Titcomb *v.* Morrell,[2] it is true, had pressed upon it this distinction, but felt itself bound by the authority of Bartlett *v.* Bartlett,[3] especially as it found no authority in favor of the doctrine here contended for. The distinction was pointed out in Ryan *v.* Dox,[4] which was a case where the defendant had bought in at a foreclosure sale property which had been mortgaged by the plaintiff, under

[1] Tidd *v.* Lister (1820) 5 Madd. 429; Taylor *v.* Arnitt (1830) 1 R. & M. 501; Blake *v.* Bunbury (1790) 1 Ves. Jr. 194, 514; Jenkins *v.* Milford (1820) 1 J. & W. 609; Denton *v.* Denton (1844) 7 Beav. 388; Wickham *v.* Berry (1867) 55 Pa. St. 70.

[2] (1865) 10 Allen 15. [3] (1859) 14 Gray 277.

[4] (1866) 34 N. Y. 307, 319.

a parol agreement, with plaintiff, to purchase and hold the property for him. The Court in permitting the plaintiff to recover, pointed out the similarity of this case to a case where plaintiff is allowed to recover on a quasi contract from defendant, who has repudiated the contract, relying on the Statute of Frauds. The Court, referring to cases of quasi contract where the defendant, relying upon the Statute of Frauds, had repudiated the contract, said at p. 318:

"Many of these cases are identical in all important particulars with this, and there is no good reason why the same rules of law and morals enunciated in them should not govern and control the decision in this case. The fact that an agreement is void, under the Statute of Frauds, does not entitle either party to relief in equity, but other facts may; and when they do, it is no answer to the claim for relief, that the void agreement was one of the instrumentalities through which the fraud was effected. * * * Where one of the parties to a contract, void by the Statute of Frauds, avails himself of its invalidity, but unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim, that the opposite party may happen to secure the same practical benefit, through the process of restitution, which would have resulted from the observance of the void agreement."[1]

Ryan *v.* Dox is followed,[2] but the decision is sustained on the ground that the Court is enforcing an agreement which is taken out of the Statute by reason of its part performance.

The English cases, however, seem to have appreciated fully that in giving the grantor a remedy they were enforcing a true constructive trust, akin to the case where defendant has acquired title to plaintiff's property by active fraud,[3] and not an express trust created by parol. The English cases seem not to have been cited in the American decisions, with the exception of Leman *v.* Whitley.[4]

The well settled jurisdiction of equity to declare a con-

[1] See also Barrell *v.* Hanrick (1868) 42 Ala. 60, 73; Dickerson *v.* Mays (1882) 60 Miss. 388.

[2] Canda *v.* Totten (1898) 157 N. Y. 281.

[3] Lincoln *v.* Wright (1859) 4 De G. & J. 16; Davies *v.* Otty (1866) 35 Beav. 208; Rochefoucauld *v.* Boustead [1897] 1 Ch. 196; Haigh *v.* Kaye (1872) L. R. 7 Ch. App. Cases 469; In re Duke of Marlborough, Davis *v.* Whitehead [1894] 2 Ch. Div. 133.

[4] (1828) 4 Russ 423; overruled in Davis *v.* Whitehead [1894] 2 Ch. Div. 133; cited in Patton *v.* Beecher (1878) 62 Ala. 579, 589, Burt *v.* Wilson (1865) 28 Cal. 632, and Philbrook *v.* Delano (1849) 29 Me. 410.

veyance absolute in form, and given as security, a mortgage, and to compel a reconveyance, presents a close analogy to the case of a parol trust in favor of the grantor. The substantial basis of the jurisdiction is the inequitable conduct of the grantee in receiving the property for one purpose, and using it for another, and equity, consequently, imposes upon the grantee, an equitable obligation to restore the property to the grantor upon payment of the mortgage indebtedness. The inequitable conduct of the grantee in retaining the property for his own purposes is sufficient to give equity jurisdiction to declare the deed a mortgage, despite the parol evidence rule, and the provision of the Statute of Frauds. That equity should take jurisdiction in such a case and withhold it in a case where the express obligation of a trustee is repudiated by the grantee and rendered unenforcible by the Statute is not only inconsistent, but gives countenance to gross fraud and oppression. As between the case of a deed held to be a mortgage, and the case under consideration, the analogy has been denied. The Court said in Sturtevant *v.* Sturtevant:[1]

"In the case of an absolute conveyance intended as a mortgage, we have held, following what we deemed the course of decision and the practice of the profession, that the mortgage might be made out by parol * * * but that case affords no ground for saying that a parol trust can be upheld."

The suggestion that it is the express parol trust which is to be upheld, indicates that the Court in dealing with this analogy has fallen into the same error as in dealing with the analogy of the case under consideration to quasi contract. As has already been pointed out, the right sought to be enforced is the right to restitution, and not the right to enforce the express trust, and it is the former and not the latter, as was supposed by the learned Court, which, it is suggested, might be likened to the right to have a deed absolute in form declared a mortgage. The Court in Patton *v.* Beecher[2] failed to note this distinction in commenting on the analogy of the case under consideration to a deed declared by the court of equity to be a mortgage, and said with respect to it at p. 594:

[1] (1859) 20 N. Y. 39, 40. [2] (1878) 62 Ala. 579.

"If the creditor accepts the deed on no other consideration, and for no other purpose than as a security for a debt, a case of fraud and trust is made out, which requires the interference of the court to give effect to the equity of redemption if it is denied. This class of cases has always been distinguished from a mere oral agreement by the grantee, that he will hold for the use of the grantor."

The learned Court seems to have lost sight of the fact that the grantor, in the case under consideration, as well as in the case of a deed declared by equity to be a mortgage, accepted the trust *res* for no other purpose than to hold it as trustee, and that upon his failure so to do, the question is not one of enforcing "a mere oral agreement by the grantee that he will hold for the use of the grantor," but of compelling a restitution to the grantor of his property, because the grantee is unwilling to carry out that purpose. In Rasdall *v.* Rasdall,[1] a leading case in the United States, the analogy was conceded, but the Court rejected it as not controlling the case under consideration, because it doubted whether the equitable doctrine of declaring a deed absolute in form a mortgage could be said to be sound in principle or established by authority. After pointing out that a repudiation of the mortgage was sufficient fraud to justify the Court in holding the grantee under a deed absolute in form to be a mortgagee, the Court said at p. 391:

"And in determining this question, I can see no distinction between an express trust and a parol agreement making a deed a mortgage. If the refusal to abide by the latter is to be held on principle, to be such a fraud as takes the case out of the rule, and justifies parol evidence, I can see no reason why a refusal to execute an express trust, evidenced only by parol, should not be so held. The injustice, the wrong and the fraud are not only as great, but greater in the latter case than in the former. For in the former, the party would only get the land for the money he had loaned, while in the latter he would get it for nothing. And if the cases are to be held correct upon principle, we can see no reason why the refusal by any party to perform a parol agreement within the Statute of Frauds, should not be held such a fraud as would take the case out of the Statute, whenever such refusal would work hardship and injustice upon the opposite party. But we must say that we think these decisions cannot be sustained upon principle, and that, if established by authority too firmly to be shaken, it must be regarded as an invasion upon the Statute which cannot justify still further encroachment. And it is perhaps not so settled on authority as to be beyond question."

[1] (1859) 9 Wis. 379.

There can be no gainsaying the correctness of the learned Court in its statement of the analogy between a conveyance declared by a Court of Equity to be a mortgage, and the case under consideration. The Court did not state its authority for rejecting the doctrine of declaring a conveyance absolute in form a mortgage as not being settled by authority or justifiable upon principle, but whatever authority it may have had, the almost unbroken current of authority in favor of the doctrine, and its complete harmony with the accepted principles upon which equity acts, can leave no serious question as to its soundness; and the complete analogy between the two cases so admirably stated by the Court should leave no question as to the correctness of applying the same doctrine in the case of a conveyance of land upon a parol trust for the grantor.

As is to be expected in the case of a doctrine so harsh and oppressive, courts hesitate to apply it with rigid logic, and the tendency is to curtail its application by artificial limitations and exceptions. New York courts have hit upon the happy device of a "confidential relation" existing between grantor and grantee as a basis of giving some relief to the defrauded grantor. In Wood *v.* Rabe,[1] and in Goldsmith *v.* Goldsmith,[2] a confession of judgment in the former case from child to parent, and in the latter case a conveyance from parent to child, was held to constitute such a confidential relationship. In applying this test, the fact that in every case the grantor had sufficient confidence in the grantee to transfer his property to him upon the grantee's parol agreement to take the trust, would seem to establish the relationship. The Court, however, rested its decision in part, at least, upon the fact that the parties were relatives. The degree of consanguinity, however, upon which the existence of such confidential relationship may depend is yet to be determined. In Brison *v.* Brison[3] the doctrine was applied to a conveyance between husband and wife.[4] In Korford *v.* Thompson,[5] the fact that plaintiff and defendant were joint owners of land at the time plaintiff

[1] (1884) 96 N. Y. 414. [2] (1895) 145 N. Y. 313.
[3] (1888) 75 Cal. 525.
[4] Myers *v.* Myers (Ill. 1897) 47 N. E. 309 acc.
[5] (Neb. 1905) 102 N. W. 268.

conveyed the land was held to be sufficient to give rise to the confidential relationship entitling the plaintiff to relief.[1] Other courts have failed to apply the doctrine, although they appear not to have expressly rejected it.[2]

Recognizing that any active fraud on the part of the defendant in inducing the conveyance would entitle plaintiff to treat the defendant as constructive trustee, the courts have been most alert to discover fraud, and thus afford some relief on that ground.[3]

The general tendency of the courts, therefore, in those jurisdictions which have failed to find the constructive trust in the case supposed, has been to reach in a great number of cases by indirection, a result which the English courts and the courts in a few of the United States have reached directly by a logical application of the principles of equity, accepted and applied in analogous cases, and while correct results reached by inadmissible methods are sometimes to be desired, it is to be hoped that in jurisdictions where this case may arise as a case of novel impression, it will receive the careful consideration which it deserves, and its final disposition be governed by principles controlling courts of equity in analogous cases, and leading to a more just result than has been reached by the courts in the majority of jurisdictions.

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[1]See also Allen *v.* Jackson (1887) 122 Ill. 567.

[2]Husband and wife: See Brock *v.* Brock (1889) 90 Ala. 86; Fitzgerald *v.* Fitzgerald (Mass. 1897) 47 N. E. 431. Parent and child: Bartlett *v.* Bartlett (1859) 14 Gray 277; Titcomb *v.* Morrill (1865) 10 Allen 15. Brothers: Russ *v.* Mebius (1860) 16 Cal. 350.

[3]Brown *v.* Doane (1890) 86 Ga. 32; Lantry *v.* Lantry (1869) 51 Ill. 458; and see, also, Brison *v.* Brison (1888) 75 Cal. 525; Goldsmith *v.* Goldsmith (1895) 145 N. Y. 313.